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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

LEWIS D. BARTON, DISTRICT DIRECTOR, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, DISTRICT NO. 11, APPELLANT

v.

ANTONIA SENTNER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the statutory three judge court (Appendix A, *infra,* pp. 12–38) is reported at 145 F. Supp. 569.[1] The findings of fact and conclusions of law are annexed as Appendix B, *infra,* pp. 39–53.

JURISDICTION

The order of the three judge court granting and denying an injunction was filed November 2, 1956 (Appendix C, *infra,* pp. 54–56). The appellant's

[1] Lewis D. Barton, the appellant herein, was substituted for Henry J. Colarelli, the original defendant, by order entered October 19, 1956.

notice of appeal to this Court was filed November 30, 1956. The jurisdiction of this Court on appeal from the order of a three judge court granting or denying an injunction is conferred by 28 U. S. C. 1253. *Radio Corporation of America* v. *United States*, 341 U. S. 412; *United States* v. *Great Northern Railway Co.*, 343 U. S. 562.

QUESTIONS PRESENTED

1. Whether Section 242 (d) of the Immigration and Nationality Act of 1952 (which requires the Attorney General to prescribe conditions for the supervision of aliens against whom a final order of deportation has been issued but whose deportation has not been effectuated within six months of such final order) authorizes, and if so can validly authorize, the Attorney General to prescribe conditions other than those necessary to assure that the alien will be available for deportation and to aid the Attorney General in carrying out his duty to deport the alien.

2. Whether paragraphs 6 and 7 of the order of supervision, requiring an alien ordered deported for membership in the Communist Party not to support the Communist Party and not to associate with persons (other than members of the alien's family or counsel) known or believed to be members of or affiliated with the Communist Party, exceed the authority which has been or can be delegated to the Attorney General by Congress in Section 242 (d).

3. Whether paragraphs 6 and 7 of the order of

supervision are invalid as representing an abuse of discretion.

4. Whether paragraph 3 (b) of the order of supervision, which provides that the alien shall apply to the Immigration and Naturalization Service for permission to change her place of residence from one immigration district to another at least 48 hours prior to such change, was improperly construed by the district court to require merely that the alien must notify the Service of her intention to change residence and remain in the district for 48 hours after so doing, but may then change residence without permission.

5. Whether paragraph 10 of the order of supervision, which provides that the alien shall not travel outside the State of Missouri without obtaining prior permission, was improperly construed by the district court to mean that the alien must merely give prior notice of her intention to travel outside the state but need not obtain permission to do so.

6. Whether paragraphs 3 (b) and 10 of the order of supervision, properly construed, are valid and constitutional.

STATUTE INVOLVED

Section 242 (d) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 208, 211, as amended September 3, 1954, 68 Stat. 1232,[2] 8 U. S. C. (1952 ed. Supp. III) 1252 (d), provides:

[2] This amendment deleted the words "shall upon conviction be guilty of a felony, and" from the list of sanctions set forth in the final sentence.

Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both.

STATEMENT

Appellee, who had been ordered deported in April, 1953, because of her membership in the Communist Party, was on October 9, 1953, served with an order of supervision issued under Section 242 (d) of the

Immigration and Nationality Act of 1952, *supra,* pp. 3–4. In October, 1953, she filed in the District Court for the Eastern District of Missouri a complaint for declaratory judgment and an injunction against enforcement of the order of supervision, alleging that the statute under which it was issued was unconstitutional and the order of supervision invalid. A temporary restraining order, enjoining enforcement of the order of supervision, was issued December 17, 1953.

After defendant had filed a motion to dismiss, and plaintiff a motion for summary judgment, the matter was referred to a three judge court for determination. During pendency of the proceedings, a revised order of supervision was served upon appellee. The decision of the three judge court is based upon that modified order, the pertinent provisions of which are set forth in the opinion, *infra,* pp. 14–18. The court sustained the constitutionality of the statute on its interpretation of the statute as authorizing the Attorney General to impose only such conditions as directly relate to the alien's deportation or availability for deportation. On that interpretation, the court held certain provisions of the order of supervision invalid and subjected others to a construction which appellant believes to be erroneous.[3] The holding as to particular paragraphs of the order of supervision and appellant's position with respect thereto may be summarized as follows:

[3] The court also held that the Attorney General was not a necessary party to the action. Appellant does not appeal from that aspect of the decision.

1. The court held non-justiciable paragraphs (1), (2) and (9) of the order of supervision requiring the alien to produce herself for deportation when ordered to do so; requiring her to submit for medical examination when required to do so; and requiring her to give information under oath concerning her conduct, associations and activities. The court held that all these provisions did not now affect appellee and that there was no showing of any present attempt to enforce these provisions as to her.

Appellant is not appealing from this aspect of the court's order.

2. The court held valid paragraph 3 (a) providing that the alien shall notify the Immigration and Naturalization Service of a change in residence and employment within 48 hours after the change is made and paragraph 4 providing for reporting in person once a month. The court found these provisions reasonably related to availability for deportation.

Appellant is not appealing from this aspect of the court's order.

3. The court also held valid, on the same ground, paragraph 3 (b) providing that the alien shall apply to the Service for permission to change her place of residence from one district to another at least 48 hours prior to such change and paragraph 10, providing that the alien shall not travel outside the state without permission, but in so doing the court construed these paragraphs as not authorizing the Service to withhold permission. It construed paragraph 3 (b) as merely preventing a change of residence without permission for forty-eight hours after notification; and paragraph

10 as merely requiring notice prior to travel outside the state.

The appellant is appealing from that portion of the decision holding that the Service is not authorized to refuse permission under appropriate circumstances.

4. The court also held invalid paragraph 6 providing that the alien shall terminate and remain disassociated from membership in and support of activity in furtherance of the doctrines and policies of the Communist Party, and paragraph 7 providing that the alien shall refrain from associating with any persons (not including family or counsel), knowing or having reasonable ground to believe that such person is a member of or affiliated with the Communist Party or Communist activities. This holding was based partly on the court's interpretation of the statute as limiting the power of the Attorney General to the type of supervision which will assure the alien's availability for deportation. Beyond that, the court held that, even if the Attorney General had the power to prescribe activities in the interest of national security, these paragraphs are invalid for vagueness. It also ruled that they should be invalidated to avoid constitutional issues of freedom of speech and association. And finally it held that, even if in some instances such regulations would be justified in the interest of national security, the imposition of these conditions was an abuse of discretion in this case.

Appellant appeals from all aspects of this holding.

5. The court held invalid paragraph 5, providing that the alien shall conduct herself in an orderly

manner. It ruled that, if the phrasing is to have any definiteness, it derives content from the traditional law of disorderly conduct, and that, if so construed, it adds a penalty to a state offense which is outside the scope of the statute.

Appellant is not appealing from this aspect of the court's order.

6. The court held invalid paragraph 8, providing that the alien shall not violate the Smith and Internal Security Acts, on the ground the Congress had already made such acts a crime.

The appellant is not appealing from this aspect of the court's order.

In summary, appellant is appealing from the conclusions of law, embodied in the order of November 6, 1956, to the following extent: conclusions of law Nos. IX, X, XI, XIII, XV, XVIII, XIX, *infra,* pp. 50–52.

THE ISSUES ARE SUBSTANTIAL

1. The basic question in this case is whether Section 242 (d) of the Immigration and Nationality Act of 1952 authorizes the Attorney General to impose conditions of supervision not only to assure the alien's availability for deportation, but also to prevent the alien from engaging in activity which would be detrimental to the internal security of the United States. That same issue, in the context of questions addressed to the alien as to his continuing Communist activity, is now before this Court in *United States* v. *Witkovich,* No. 295, this Term. For the reasons stated in the government's opening brief in that case, we think that the statute was intended to authorize conditions

of supervision for the purpose of curtailing harmful activities by aliens and, in particular, activities in support of the Communist Party by persons ordered deported because of membership in the Communist Party. We also believe that, for the reasons stated in the *Witkovich* opening and reply briefs, the statute, so interpreted, is constitutionally valid and withstands attack on the grounds of vagueness, lack of due process, and infringement of First Amendment rights.

2. The court below also erred in holding that, even if supervision in the interests of national security may be authorized, the particular provisions of the order of supervision relating to membership in and support of the Communist Party and association with Communists (par. 6 and 7 of the order of supervision) were invalid for vagueness, and unreasonable as applied to appellee. The legislative history of the statute, discussed in the government's opening brief in the *Witkovich* case, shows that one of the purposes of the statute was to prevent persons ordered deported for membership in the Communist Party from continuing their activities when it proved impossible to deport them. A provision for discontinuance of Communist activities is therefore a reasonable condition of supervision as to any alien ordered deported because of Communist membership.

The charge of vagueness as to these provisions finds support only to the extent that it is possible to speculate as to borderline situations where there might be issues as to what constitutes support of Communist Party doctrine or what is meant by associating with Communists. It ignores the fact there is unquestion-

ably a hard core of activities which are clearly within the scope of the prohibition. A criminal statute is not invalidated merely because borderline cases may arise, when the general class of offenses to which the statute is directed is plainly within its terms. *United States* v. *Harriss*, 347 U. S. 612, 618; *United States* v. *Petrillo*, 332 U. S. 1, 7; *United States* v. *Wurzbach*, 280 U. S. 396, 399. Much less should the condition of supervision be held invalid because of possible borderline cases. Any question of interpretation as to particular situations can be placed before the administrative authorities for ruling before appellee is called upon to act. Appellee can be criminally punished for violation of the order of supervision only if her acts are willfully done. No one interested in sincere compliance with the order would have any real difficulty in understanding what is required.

3. The interpretation given by the court of paragraphs 3 (b) and 10 of the order of supervision, to the effect that the alien must notify the Service of a change of residence or intention to travel, but that the Service may not withhold its permission for the change, stems from the court's conception of the statute as authorizing only such conditions as will assure availability for deportation. Once it is recognized that the Attorney General may also prevent an alien ordered deported from taking advantage of his nondeportability to engage in activities harmful to the national security, it becomes reasonable to require that the alien obtain permission before going out of the state or making a change of residence. Of course, permission to make the change could not be arbi-

trarily withheld, but no such issue is presented by this complaint. The right to impose the condition that permission be obtained flows from the right to supervise in the interest of national security.

CONCLUSION

For the reasons stated, this appeal presents substantial questions which should be reviewed by this Court.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

JANUARY 1957.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

Civil No. 9440 (1)

ANTONIA SENTNER, PLAINTIFF, *v.* HENRY J. COLARELLI, OFFICER-IN-CHARGE OF THE IMMIGRATION AND NATURALIZATION SERVICE IN THE CITY OF ST. LOUIS, MISSOURI, DEFENDANT

Before WOODROUGH, Circuit Judge, MOORE and HARPER, District Judges.

MEMORANDUM OPINION

MOORE, *Judge*

Plaintiff, an alien subject to a final order of deportation, brought this action against defendant, the Officer-in-Charge of the Immigration and Naturalization Service of the United States in St. Louis, to set aside, and enjoin the enforcement of, a certain "Order of Supervision" issued by defendant pursuant to Section 242 (d) of the so-called McCarran-Walter Act (the Immigration and Nationality Act of 1952, 8 U. S. C. Sec. 1252 (d)). Since the complaint charged that Section 242 (d), and the Order of Supervision, were unconstitutional, a three-judge court was convened.

Defendant has filed a motion to dismiss upon various grounds, and an answer. Plaintiff has filed a reply, and a motion for summary judgment. As it appears from the pleadings that no material fact

is in issue, the matter will be disposed of upon these pleadings.

Plaintiff is a foreign born resident of the United States. She arrived in the United States on an immigrant visa and was admitted for permanent residence on July 26, 1914, when she was eight years old. She has been a resident of the United States for more than thirty-nine years and has lived continuously in the City of St. Louis, Missouri, for more than twenty-eight years. She was married in Saint Louis on February 19, 1935, and she has lived in the same house in St. Louis since 1942, together with her husband and two minor children, all of whom are native-born citizens of the United States.

In 1949, the government started deportation proceedings against plaintiff. Those proceedings culminated in an order of deportation on April 3, 1953. At one point during those proceedings the Attorney General sought to hold plaintiff without bail, but she was released by this court upon a writ of habeas corpus. *Ex parte Sentner,* 94 F. Supp. 77. Otherwise, plaintiff has at all times since 1949 been free on bond of $2,000, which is still outstanding. She has at all times kept herself available for hearings, and has fully complied with all terms of the bond.

A little more than six months after the entry of the order of deportation, on October 9, 1953, defendant issued an "Order of Supervision", purporting to limit plaintiff's freedom in several respects, and pointing out that violation of the terms of such an order is a criminal offense, in violation of Section 242 (d). Plaintiff thereupon brought this action to declare the order void, and a preliminary restraining order was issued.

During the pendency of this action, and shortly before the argument of this case, defendant modified

the "Order of Supervision", and served the new order upon plaintiff. Neither party has taken the position that this new order renders the case moot, and neither has urged that the case be dismissed upon that ground. Nor should the case be dismissed as moot, for defendant should not be permitted to frustrate judicial review simply by issuing a new order from time to time. The complaint has been formally amended to seek review of "any orders" issued pursuant Section 242 (d). It is clear that the new order is now the basis of the controversy between the parties, and the oral argument has been directed in large measure toward the new order. Since the new order differs only slightly from the old one, the simplest way to dispose of the case is to regard the complaint as having been amended to seek review specifically of the new order. That order reads as follows:

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

District File No. A–4579002
A. R. No. A–4579002
Date January 16, 1956

ORDER OF SUPERVISION

In the case of Antonia Sentner, whose deportation in accordance with law was ordered on April 3, 1953.

Section 242 (d) of the Immigration and Nationality Act provides:

"Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney

General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than 1 year, or both."

Therefore it is hereby ordered that such alien shall be placed under supervision and permitted to be and to remain at large upon the following terms:

(1) That said alien shall produce himself, at time and place designated, for deportation pursuant to the order of deportation.

(2) That said alien shall upon request produce himself at a time and place designated for the purpose of submitting to medical and psychiatric examination and/or to furnish such information as may be deemed fit and proper.

(3–a) That said alien shall notify the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) here-

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of of any change in residence or employment, within the immigration district, within 48 hours after change is made.

(3–b) That said alien shall apply to the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) for permission to change place of residence from one immigration district to another, at least 48 hours prior to such change.

(4) That said alien shall report in Person on the 9th day of each month at ____ (a. m.) (p. m.) to the Officer in Charge of the Immigration and Naturalization Service at Room 602, New Federal Building, 12th and Market Streets, St. Louis, Mo.

(5) That said alien shall conduct herself in a lawful and orderly manner.

(6) That said alien shall terminate and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state, or of any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate, or subdivision of any such group or organization.

(7) That such alien shall refrain from "associating" with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in subparagraph (6) above, provided that the term "associating" as used in this subparagraph shall not be construed to include members of such alien's family or professional legal counsel if such associations are not used in furtherance of the doctrines, policies, or activities of any of the organizations or activities mentioned in subparagraph (6).

(8) That said alien shall not violate section 2385 of the "Smith" Act of June 25, 1948 (section 2385 of Title 18 U. S. Code) and Section 4 of the Internal Security Act of September 23, 1950 (section 783 of Title 50, U. S. Code).

(9) That said alien shall upon request report in person for the purpose of giving information under oath to an immigration officer concerning her conduct, associations and activities.

(10) That said alien shall not travel outside the State of Missouri without obtaining prior permission from the officer-in-charge, Immigration and Naturalization Service, St. Louis, Mo.

HENRY COLARELLI,
St. Louis, Mo.
(*Officer in Charge, Immigration and Naturalization Service*).

I, ANTONIA SENTNER, hereby acknowledge that I have read and understand the terms of this order, a copy of which I have received. I further understand that failure to comply with the terms of this order or with any of the conditions of 242 (d) of the Immigration and Nationality Act, will subject me to prosecution.

(Signature typed in, but alien did not sign)

ANTONIA SENTNER
(Alien's signature)
5673 Cabanne Ave., St. Louis, Mo.

(SIGNED)
ERNEST W. ROSENKOETTER

Immigration Officer
Investigator,
U. S. Immigration & Naturalization Service
St. Louis, Mo. (Address).

I, ---------- hereby acknowledge that I understand the terms set forth above and hereby agree to furnish a written report ------ -------- each month to the Officer in Charge

concerning the alien's name, registration number, current address, place of employment, associates, and organizational activities, and that I will immediately report any failure on the part of the alien to comply with the terms of the order or information coming to my attention which might indicate that the alien intends to abscond or otherwise violate this order.

ST. LOUIS, MISSOURI; *January 16, 1956:*

I hereby certify that the above Form I–220–B was read to the subject, Antonia Sentner, in its entirety this date by Investigator Ernest W. Rosenkoetter, and that the subject thereupon refused to sign her name in the space provided therefor.

(SIGNED) WILLIAM H. PHILLIPS,
Investigator,
U. S. Immigration & Naturalization Serv.

(SIGNED) NORMAN M. MAGEE,
Investigator
U. S. Immigration & Naturalization Serv.

I. THE ORDER IS REVIEWABLE IN THIS COURT, AT LEAST IN PART

The order is in general subject to judicial review in a proceeding of this sort. *Nukk* v. *Shaughnessy,* 350 U. S. 869. Cf. *Shaughnessy* v. *Pedreiro,* 349 U. S. 48, 50–52.

As will appear below, some parts of this order do not now present a justiciable controversy, and to the extent that this action seeks review of those parts the action will be dismissed. However, some parts of the order clearly create duties immediately enforceable by criminal prosecution, and are therefore reviewable at this time. Cf. Frankfurter, J., concurring, in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, at 156 n. 6. The issue of justiciability has been settled by the recent decision of the Supreme Court in *Nukk* v. *Shaughnessy,* 350 U. S. 869. That case in-

volved an order quite similar to the order presented in this case; the Supreme Court reversed the District Court's dismissal and remanded the case for "consideration on the merits", citing *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125.

The order being reviewable, this court has jurisdiction of the action by virtue of 8 U. S. C. 1329.

II. NEITHER THE ATTORNEY GENERAL NOR THE COMMISSIONER OF IMMIGRATION IS AN INDISPENSABLE PARTY TO THIS ACTION

A principal ground of the motion to dismiss is that plaintiff has failed to join an indispensable party, although it is not entirely clear whether the indispensable party is alleged to be the Attorney General or the Commissioner of Immigration. In support of this contention defendant relies upon, inter alia, *Vaz* v. *Shaughnessy,* 208 F. 2d 70. The contention is without merit.

Where the applicable regulations delegate to the District Director, or the local Officer-in-Charge, the authority to promulgate orders, and to make those orders final, he is the only necessary party in a proceeding to review those orders. *Shaughnessy* v. *Pedreiro,* 349 U. S. 48, 52–53. That is the case here. See 8 Code Fed. Regs., Section 242.3 (c) (1). The rule is not only settled but sound, for there appears to be no reason why plaintiff should go all the way to the District of Columbia to obtain judicial review of this order. If there were any doubt about the applicability of this principle to this case, one may infer that the doubt has been removed by the reversal of *Nukk* v. *Shaughnessy,* supra.

III. A VIOLATION OF THE ORDER OF SUPERVISION WILL NOT BRING ABOUT DETENTION OF PLAINTIFF WITHOUT A JURY TRIAL

Plaintiff apparently assumes, from reading the order of supervision, that a violation of the order of

supervision could subject her not only to criminal prosecution but also to being picked up by the Attorney General and detained without a jury trial, somewhat in the manner of a revocation of parole. The order does indeed appear to contemplate such action. Plaintiff argues vigorously that such a procedure would deny her a jury trial guaranteed by the Constitution.

The power of the Attorney General, however, is derived from the statute, not from the order. The statute does not authorize detention of a deportable alien for more than six months after the order of deportation becomes final, except perhaps under unusual circumstances. Cf. *United States* ex rel. *Cefalu* v. *Shaughnessy,* 117 F. Supp. 473, affirmed on authority of opinion below, 209 F. 2d 959 (C. A. 2). After expiration of the six-month period, the only section of the statute that gives the Attorney General any power over the alien—other than the power to deport—is Section 242 (d), and that section authorizes only supervision, not detention. Even if plaintiff should violate the terms of a valid order of supervision, therefore, the Attorney General could not "revoke" this "parole" and further detain plaintiff. *Shrode* v. *Rowoldt,* 213 F. 2d 810 (C. A. 8); *United States* ex rel *Daniman* v. Shaughnessy, 210 F. 2d 564 (C. A. 2); *United States* ex rel. *Blankenstein* v. *Shaughnessy,* 117 F. Supp. 699, 704 (S. D. N. Y.). All that the Attorney General could do in that event would be to institute criminal prosecution for violation of the terms of the order, under Section 242 (d), and in such a criminal prosecution there would of course be a right to trial by jury. This aspect of the case may therefore be put to one side.

IV. PARAGRAPHS 5 AND 8 OF THE ORDER EXCEED THE AUTHORITY DELEGATED BY CONGRESS TO THE ATTORNEY GENERAL

Paragraphs 5 and 8 of the order are quoted in full above. Briefly, paragraph 8 orders plaintiff to refrain from violating certain provisions of the Smith Act or the Internal Security Act. Paragraph 5 orders her to conduct herself "in a lawful and orderly manner."

At first glance it is not entirely clear what is meant by the word "orderly" in Paragraph 5. Common sense suggests, however, that this word derives content from the traditional law of disorderly conduct. Since such an interpretation would go far toward answering the argument that paragraph 5 is unconstitutionally vague, it may be assumed that the word carries some such meaning. Cf. *Beauharnais* v. *Illinois*, 343 U. S. 250.

So construed, these paragraphs accomplish nothing more than adding to the penalties already imposed on conduct which is already criminal. The government, of course, has an interest in discouraging plaintiff from violating the Smith Act or Internal Security Act, but Congress has taken care to protect that interest in its own way, by establishing criminal penalties in the Smith Act itself. This Court is now asked to infer that in 1952 Congress was dissatisfied with these penalties, as they apply to deportable aliens but not to other persons, and that Congress therefore delegated to the Attorney General the power to delegate to the local Officer-in-Charge the power to decide whether, in the case of any individual deportable alien, it would be wise to promulgate an order which adds another count to any possible indictment for violation of these laws, and adds slightly to the maximum penalty in the event of conviction. Surely this would be a most extraordinary sort of action for Congress

to choose, and this court has not been directed to any evidence that any such purpose underlay the enactment of Section 242 (d). While Section 242 (d) does authorize "reasonable written restrictions" upon the alien's conduct, it is hardly conceivable that Congress sought to authorize the Attorney General, through his subordinates, to duplicate criminal provisions already on the statute books. A paragraph, such as paragraph 8, which accomplishes no more than that, is outside the authority conferred by Congress.

Paragraph 5, as construed above, appears to duplicate state or local regulations of disorderly conduct, rather than federal criminal provisions. Assuming that Congress has the constitutional power to regulate the disorderly conduct of deportable aliens, although disorderly conduct has generally been considered to be a matter of local rather than national concern, no evidence has been produced to indicate that Congress has in fact considered such disorderly conduct to be a substantial federal problem, or that Congress had any reason to take such an extraordinary step to meet such a problem. In the absence of such evidence, the statute cannot reasonaly be construed to authorize this sort of restriction. Paragraph 5, therefore, is also outside the authority conferred by Congress.

Aside from these observations, the statute as construed below does not authorize the restrictions of paragraphs 5 and 8, for they would in no way aid the Attorney General to assure himself that plaintiff will be readily available for deportation.

V. PARAGRAPHS 6 AND 7 ARE INVALID

Paragraphs 6 and 7 are quoted in full above. Briefly and inadequately summarized, they seek to prevent plaintiff from association with, or support

of, the doctrines and policies of the Communist Party, or any affiliate thereof, and from association with any person who plaintiff has reasonable ground to believe is affiliated with, or promoting, such activities. The new order contains a proviso that plaintiff may lawfully associate with her family or lawyer if such associations are not used in furtherance of such doctrines, policies, or activities. These paragraphs are invalid because they exceed the authority delegated by Congress, and because, even if these paragraphs were authorized, the pleadings establish an abuse of discretion on the part of defendant.

A. Paragraphs 6 and 7 exceed the authority delegated by Congress

Section 242 (d) subjects the alien awaiting deportation (more than six months after the order of deportation has become final) to supervision by the Attorney General under regulations to be prescribed by the Attorney General, such regulations to be of the following types: (1) to appear for identification from time to time; (2) to submit to physical and mental examinations; (3) to give information under oath as to his nationality, circumstances, habits, associations, activities, and other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) "to conform to such reasonable written restrictions on his conduct or activities as are prescribed" by the Attorney General in his case.

Paragraphs 6 and 7 clearly are not authorized by the first three parts of this section, and can be sustained, if at all, only as "reasonable written restrictions" under part 4. The inquiry must be directed, then, to the meaning of the phrase "reasonable writ-

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ten restrictions" as used in this section of the statute.

It is a familiar principle, both of common sense and of statutory construction, that a catch-all phrase of this sort must be read in the context of the general purpose of the statute, and particularly of the preceding clauses. That is to say, part 4 of Section 242 (d) cannot be taken to authorize any reasonable written restriction whatever, but only reasonable written restrictions calculated to assist the Attorney General in carrying out his powers and duties under the statute, and more specifically only reasonable written restrictions of the same sort—ejusdem generis—as those authorized in the first three parts of Section 242 (d).

After the expiration of the six-month period, as pointed out above, the Attorney General retains only two powers with respect to the alien; to deport her, and to supervise her. Supervision, of course, is not an end in itself; the power to supervise could be conferred only as an auxiliary to the other power. The supervision authorized, then, is supervision designed to aid the Attorney General in carrying out his duty to deport the alien, that is, in assuring that the alien will be available for deportation. See the opinion of Judge Sullivan, in *United States* v. *Witkovich*, No. 55 CR 607, D. C. N. D. Ill., Eastern Division, appeal pending, No. 295, 1956 Term.

The restrictions authorized by parts 1 and 2 of Section 242 (d) are clearly directed solely toward that purpose. While parts 3 and 4 are not so clearly limited by their own terms, they are entirely consistent with such an interpretation, and must be so construed. Part 4, then, authorizes "reasonable written restrictions" designed to aid the Attorney General in assuring that the alien will be available for deportation, but not other restrictions designed to achieve some other

objective. Paragraphs 6 and 7, restricting plaintiff's associations, would not assist the Attorney General at all in this respect, and therefore are not of the sort authorized. *United States* v. *Witkovich,* supra.

Beyond the terms of the Immigration and Nationality Act of 1952, evidence of the legislative purpose may be found in other statutes bearing on the same subject. It is well known that Congress has enacted many statutes in the field of subversive activities. It seems hardly likely that Congress, by the general language of Section 242 (d), has authorized the Attorney General to add to these regulations any new restrictions he might desire, applying to individual deportable aliens. When Congress sought to confer upon the Attorney General the power to detain aliens without bail, on the ground that their freedom might be harmful to the national security, Congress set forth this power specifically. Section 242 (a). See *Carlson* v. *Landon,* 342 U. S. 524. If Congress were to confer any further power to regulate subversive or potentially subversive activities of deportable aliens, one would hardly expect the power to be conferred by general language of this sort. On the contrary, the record of Congressional regulation in this area indicates that Congress considers itself competent to regulate such activities, and considers that it has already dealt with such activities in a satisfactory manner.

Even if the statute were construed to authorize "reasonable written restrictions" directed toward such activities, however, the restrictions of paragraphs 6 and 7 cannot be said to be reasonable. Surely one element of reasonableness is that the restrictions be fairly specific, so that the alien may know what activities are prohibited; paragraphs 6 and 7 are unreasonably vague. Under these paragraphs, criminal penalties would turn on the words "activity

* * * in furtherance of the doctrines and policies of" the Communist Party or any affiliate thereof. Yet those doctrines and policies change frequently, and even the experts frequently cannot agree on what those doctrines and policies are. It seems hardly fair to hold plaintiff to a higher degree of expertise than our political analysts possess, and then rely upon a jury to meet the same level of expertise; yet that is the effect of these paragraphs.

The vagueness of these restrictions can be illustrated by a few examples. Thus, it has often been suggested that the Communists desire to take advantage of racial problems in this country by advocating integration in the south, thereby supposedly stimulating unrest and discord. If that is true, is such advocacy a "doctrine" or "policy" of the sort contemplated by paragraphs 6 and 7? It is hardly reasonable to suppose that the Attorney General, by these two paragraphs, seeks to preclude plaintiff from expressing approval of the decision of the Supreme Court in the *School Segregation Cases*, 347 U. S. 483, or of the position taken by this same Attorney General in those cases. Yet such an expression would appear to be activity in furtherance of that "policy". If those paragraphs do not have this effect, it is not easy to say what their meaning is.

Or it may be assumed that it is a policy of the Communist Party to bring about the reversal, on appeal, of the conviction of plaintiff's husband under the Smith Act. If so, apparently a word of encouragement from plaintiff to her husband would be activity in furtherance of that policy, and therefore a violation of paragraph 6. Yet it seems hardly likely that the Attorney General, or his subordinate, the defendant, intended to make such encouragement a criminal act.

Surely the defendant could have spelled out more specifically what, if anything, he had in mind when these two paragraphs were prepared. Putting aside the vagueness of some of the other language of these two paragraphs, restrictions as vague as these cannot meet the standards of definiteness prescribed by Congress in authorizing "reasonable written restrictions".

Finally, it is in order to recall that the Supreme Court has admonished, time and time again, that when a serious question of constitutionality is raised the courts should construe the statute to avoid that question, if such a construction is reasonable possible. E. g., *Crowell v. Benson*, 285 U. S. 22, 62. Serious constitutional questions would certainly be raised by paragraphs 6 and 7 of this order of supervision, if they had been authorized by Congress. For example, administrative regulations, and especially those bearing criminal penalties, are subject to the same requirements of definiteness as are statutes. *M. Kraus & Bros.* v. *United States*, 327 U. S. 614, 621 (1946); *Boyce Motor Lines* v. *United States*, 342 U. S. 337. Thus, the Attorney General is required not only by the statute but also by the Constitution to give the alien fair notice of the conduct which is proscribed by the regulations promulgated under Section 242 (d). The vagueness of paragraphs 6 and 7 has already been pointed out above; this vagueness would raise a substantial constitutional question, if the statute were construed to authorize these paragraphs.

Nor would Section 242 (d) itself be free from serious attack on the ground of vagueness, if that section were construed to authorize paragraphs 6 and 7. For if the Attorney General's discretion in promulgating supervisory restrictions is not limited to restrictions designed to aid him in the perform-

ance of the only power remaining to him—the power to deport the alien—there does not appear to be any limitation at all. Some limitation must be found in the Act, if the delegation is not to run afoul of the principle of separation of powers, Cf. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, but none appears.

Problems of vagueness are not the only constitutional issues which would arise if the statute were construed to authorize paragraphs 6 and 7 of the order, for the limitations which those paragraphs impose on plaintiff's freedom of speech and association appear to collide head-on with the First Amendment. Moreover, the ad hoc nature of these restrictions, applying only to a specific named individual, would appear to raise substantial questions under the due process and bill of attainder clauses of the Constitution.

All of these constitutional questions can be avoided by the interpretation of the statute set forth above. Even if that interpretation were only one of several possible interpretations, therefore, rather than the only reasonable interpretation apparent, it would be the duty of this court to adopt that interpretation.

B. Even if paragraphs 6 and 7 were authorized by Congress, the pleadings show that defendant has abused his discretion in this case

If the Attorney General has any discretion to limit plaintiff's associations, as he has sought to do in paragraphs 6 and 7, that discretion must be exercised according to some standard. As indicated above, no standard has been found in the statute, but it might be well to assume for a moment that more discerning eyes would find such a standard. It might be suggested, for example, that the Attorney General has been authorized to prescribe any reasonable written regulation calculated to protect the security of the

nation, a standard more or less similar to the standard guiding the exercise of his discretion to detain without bail under Section 242 (a). See *Carlson* v. *Landon,* 342 U. S. 524; *Ex parte Sentner,* 94 Fed. Supp. 77.

Such a discretion would appear to be a highly personal and individual discretion, and it may well be that Congress would never have intended such a discretion to be delegated to the local District Director or Officer-in-Charge, notwithstanding the general language of 8 U. S. C. sec. 1103. Cf. Black, J., dissenting in *Carlson* v. *Landon,* 342 U. S. 524, at 553–554. However, it may be further assumed, with reservations, that such a discretion was properly delegated in this instance.

On these assumptions, the facts established by the pleadings in this case show a clear abuse of discretion on the part of defendant. The pleadings show that plaintiff has resided in the United States for more than thirty-nine years, and has lived continuously in St. Louis for more than twenty-eight years; that she was married in St. Louis twenty-one years ago, and has lived in the same house, with her husband and two minor children (all native-born citizens of the United States) since 1942. Nothing in these facts suggests that the security of the United States would be endangered if plaintiff were permitted to associate with Communists, or to carry on some activity in furtherance of some policy of the Communist Party, nor does any of these facts suggest any other reason for the exercise of discretion in this case.

Defendant's answer, in fact, does not allege any facts at all which might tend to explain the exercise of discretion in this case. Whatever may be the standard of discretion, it was incumbent on defendant to put forth some sort of explanation. *Ex parte Sent-*

ner, 94 Fed. Supp. 77. Cf. *Carlson* v. *Landon*, 342 U. S. 524, at 529–531, 532.

VI. PARAGRAPHS 1, 2, AND 9 PRESENT NO JUSTICIABLE CONTROVERSY AT THIS TIME

Paragraphs 1, 2 and 9 are quoted in full above. Briefly, paragraph 1 requires that plaintiff produce herself for deportation, if and when she is ordered to do so. The pleadings indicate that she has not been ordered to do so, in the three years or more which have elapsed since entry of the order of deportation. It appears quite possible that she will never be ordered to do so. The requirement of Paragraph 1 is nothing more than an announcement that at some indefinite time in the future defendant may decide to issue an order which would impose immediate duties upon plaintiff. Such an indefinite matter presents no controversy justiciable at this time in this court. Cf. Frankfurter, J., concurring, in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, at 155. If and when such an order is promulgated, the validity of that order may be reviewed. So far as the complaint seeks review of paragraph 1, the complaint should be dismissed.

Similarly, paragraph 2 of the order requires that plaintiff, upon request, appear for medical and psychiatric examinations, or to furnish information requested. The pleadings do not allege that any such request has ever been made, nor is there any allegation that defendant is about to make such a request. In the absence of such allegations, no justiciable controversy is presented here.

Likewise, paragraph 9 requires that, upon request, plaintiff report to give information requested. The foregoing observations respecting paragraph 2 are equally applicable to paragraph 9.

VII. PARAGRAPHS 3A, 3B, 4, AND 10 DO NOT EXCEED THE AUTHORITY CONFERRED UPON THE ATTORNEY GENERAL BY SECTION 242 (D)

Paragraphs 3a, 3b, 4 and 10 are quoted in full above. Briefly, paragraph 3a requires that plaintiff notify defendant of any change of residence or employment, within the immigration district, within 48 hours after the change is made. The kind of information demanded by this paragraph is the kind of information concerning plaintiff's activities which is clearly calculated to aid the Attorney General in supervising plaintiff to assure that she will be readily available for deportation whenever deportation should become possible. The requirement that plaintiff furnish such information is therefore authorized by Section 242 (d), as construed above. Cf. *United States* vs. *Witkovich*, supra.

Paragraph 3b requires that plaintiff "shall apply to * * * (defendant) * * * for permission to change place of residence from one immigration district to another, at least 48 hours prior to such change." The order does not state whether defendant seeks to reserve to himself the power to withhold such "permission", or whether such "permission" would be granted automatically. If the former interpretation is the proper one, it is not entirely clear that the validity of this paragraph is now justiciable, for there is no allegation that defendant has withheld permission, or is likely to withhold such permission, nor is there any allegation of the reasons which he would advance to justify such withholding. Passing the constitutional question of justiciability, such an interpretation would present a further constitutional question of infringement of a resident alien's right to travel. Cf. *Crandall* v. *Nevada*, 6 Wall. 35; *Schachtman* v. *Dulles*, 225 F. 2d 938, 941 (C. A. D. C.). And of course such an interpretation would raise an imme-

diate question whether this requirement exceeds the authority delegated by Congress in Section 242 (d), for there appears to be no reason why the Attorney General could not supervise plaintiff as well in one immigration district as in another.

All of these questions should be avoided, as noted above, if it is reasonably possible to construe the order in such a way as to avoid them. Such a construction not only appears to be reasonably available, but in fact is clearly called for by the language of paragraph 3b. That paragraph does not require that plaintiff must remain in the district until "permission" has been obtained, and this court will not interpolate such a questionable requirement. The paragraph merely requires that plaintiff remain in the district for 48 hours after notifying defendant of her intention to change her residence to another district, although the notification is termed an application for permission. Presumably this requirement is designed to give the officer in charge in this district a reasonable opportunity to notify the officer in charge in the district to which plaintiff proposes to move, so that the latter officer can prepare to supervise her on her arrival. Such a requirement would be reasonably calculated to aid the Attorney General in supervising plaintiff to assure that she will be readily available for deportation, and is therefore the kind of requirement authorized by part 3 of Section 242 (d).

Even on this interpretation of paragraph 3b there may be some question of justiciability, for plaintiff does not allege that she has any intention of changing her residence to another district. Nevertheless, paragraph 3b does impose a 48-hour limitation on plaintiff's freedom of movement; if plaintiff were required to wait until she had decided to move on the spur of the moment, before contesting the validity of this

limitation, even a favorable decision of this court would be delivered much too late to afford her any relief. The court is satisfied, therefore, that the complaint does present a justiciable controversy as to paragraph 3b, and that that paragraph, as construed above, is authorized by the statute.

Paragraph 4 requires that plaintiff shall report in person to defendant in the Federal Building in St. Louis on the ninth day of each month. Such a requirement seems reasonably calculated to aid defendant in assuring himself that plaintiff is in fact still available for deportation, and is therefore the kind of restriction authorized by part 1 of Section 242 (d).

Paragraph 10 requires that plaintiff "shall not travel outside the State of Missouri without obtaining prior permission from" defendant. If this paragraph means what it says, it would raise serious questions of constitutionality and statutory construction, as indicated above in the comments directed toward paragraph 3b. Yet it seems inconceivable that defendant, in adding this typewritten provision to the regular printed form, really intended with forethought to impose such a restriction. As noted above, when the alien desires to make a permanent change of residence to another district, paragraph 3b of the printed form does not require that she first obtain permission, but merely requires that she give 48 hours notice. It is hardly reasonable to suppose that, when confronted with the much less serious problem of a temporary visit outside the State, perhaps still within the district, defendant would demand not only prior notice but also the right to withhold permission for the trip. The inference drawn from a careful reading of the order as a whole is that paragraph 10 was inserted to supplement paragraph 3b, and that it was rather carelessly drafted without full attention to the

precise import of paragraph 3b. It follows that paragraph 10, notwithstanding the language carelessly included therein, requires nothing more than prior notice for travel outside the state. This interpretation not only makes a consistent, meaningful whole of the entire order, but also avoids the constitutional problems noted above, in accordance with the oft-repeated directions of the Supreme Court. And as interpreted, paragraph 10, like paragraph 3b, would constitute the sort of restriction clearly authorized by Section 242 (d).

VIII. PARAGRAPHS 3A, 3B, 4, AND 10, AS INTERPRETED, DO NOT INFRINGE ANY CONSTITUTIONAL PROVISIONS

As has been noted above, many of the constitutional questions presented by plaintiff have been eliminated from the case, on a close examination of the precise meaning of the authorizing statute and the order of supervision. The only valid paragraphs of that order which are now ripe for review are paragraphs 3a, 3b, 4 and 10. There remain for consideration certain minor constitutional arguments directed toward those paragaphs, as interpreted.

Certainly these paragraphs do limit plaintiff's freedom somewhat. She must notify defendant of any change of residence or employment within the district within 48 hours after making the change. She must give 48 hours prior notice to change her residence to another district. She must give prior notice to travel outside the state. And apparently she cannot plan anything that will occupy her entire day on the ninth day of each month, because she must be careful to appear at defendant's office at some time during the day.

These restrictions, and particularly the last one, are somewhat cumbersome. Clearly they constitute de-

privations of "liberty" as that word is used in the Fifth Amendment. But they are not deprivations of liberty without due process if they are reasonably calculated to achieve a legitimate governmental purpose, without imposing an unduly heavy burden on plaintiff. Assuming the validity of the deportation order against plaintiff (and that must be assumed, for it is not subject to collateral attack in this proceeding), it is a legitimate objective for defendant to seek to assure himself that plaintiff will be readily available for deportation when deportation becomes possible. And all four of these restrictions, as already noted, are reasonably designed to further that objective. Of these four, only the requirement of personal appearance on the ninth day of each month imposes any substantial burden. The other three clearly do not deprive plaintiff of her liberty without due process of law.

The requirement of regular personal appearance, however, might become quite burdensome. Circumstances might make it necessary or highly desirable for her to be out of town on the ninth day of some month, especially if she were a businesswoman rather than a housewife. Or circumstances might make it necessary or highly desirable for her to be occupied at some place other than defendant's office throughout the ninth day of each month. If she were subject to conviction of a felony for failing to appear on such a day, the restriction imposed by paragraph 4 would seem to be a good deal more severe than is necessary; defendant could adequately assure himself of plaintiff's continued presence in the district if this restriction carried a little flexibility with respect to the date of appearance.

On the other hand, to strike down the entire restriction for this reason would penalize defendant's

draftsmanship with undue severity. Surely defendant should be expected to take a reasonable view of the matter, and interpret this requirement with a reasonable degree of flexibility. If plaintiff should move permanently to another district, giving appropriate notice, no one would expect her to appear in defendant's office on the ninth day of the following month. If she should be taking a trip outside the state, after giving appropriate notice, on the ninth day of some month, no one would expect her to appear at defendant's office on that day. And if she should appear on some day other than the ninth, in the early part of the month, explaining that it will be impossible to appear on the ninth, no reasonable person would demand more. All that defendant could have intended to require by paragraph 4 is that plaintiff should appear on or about the ninth day of each month, unless she has, and communicates to him, some good reason not to appear. This court will not interpret that paragraph to require any more than that.

Thus interpreted, paragraph 4 imposes on plaintiff the burden of coming downtown to put in an appearance from time to time. The burden is not a substantial one, and is not easily avoidable. It follows that this restriction does not deprive plaintiff of liberty without due process of law.

All of the other constitutional objections interposed by plaintiff to these restrictions have been disposed of by interpretation of the statute and the order.

IX. SECTION 242 (D), AS CONSTRUED, IS CONSTITUTIONAL

There remains only the charge that the underlying statute itself is unconstitutional. Most of the constitutional objections raised, particularly those based on the First Amendment, have been avoided by construing the statute to authorize only restrictions de-

signed to aid the Attorney General in assuring that the alien will be readily available for deportation, and not restrictions upon the alien's speech or associations, or other restrictions not designed to further this purpose.

That interpretation also disposes of the charge that the statute is unconstitutionally vague, in failing to guide the Attorney General in exercising his discretion to impose restrictions upon the alien. As interpreted, the statute does furnish him a guide: he is authorized to impose restrictions which will aid him in carrying out the duty to make sure that the alien will be readily available for deportation, and no other restrictions. With this limitation, which is implicit in the legislation, it cannot seriously be urged that the statute delegates to the Attorney General an unduly broad or vague power.

X. SUMMARY

1. Paragraphs 1, 2, and 9 of the order of supervision present no justiciable controversy at this time. So far as the complaint seeks review of these paragraphs, the complaint should be dismissed, and defendant's motion to dismiss will be sustained to that extent. The motion will be overruled in all other respects.

2. Paragraphs 5, 6, 7, and 8 exceed the authority delegated to the Attorney General by Congress, and should be stricken from the order. As to these paragraphs, plaintiff's motion for a summary judgment should be sustained, and these paragraphs should be declared invalid and unenforceable; defendant should be enjoined from enforcing these paragraphs. The motion for summary judgment should be overruled in all other respects.

3. That part of Section 242 (d), as construed in this opinion, which authorizes the Attorney General to

make an order of supervision, is valid and constitutional; paragraphs 3a, 3b, 4, and 10 of the order, as interpreted above, are valid and enforceable; the order of supervision, as it remains after striking paragraphs 5, 6, 7, and 8, is not invalid on its face, and so much of it as is valid may be enforced; and a declaratory judgment to this effect will be entered.

DATED this 4th day of October, 1956.

(SIGNED) JOSEPH W. WOODROUGH,
Circuit Judge,
United States Court of Appeals.

(SIGNED) GEO. H. MOORE,
United States District Judge.

(SIGNED) ROY W. HARPER,
United States District Judge.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

Civil No. 9140 (1)

ANTONIA SENTNER, PLAINTIFF, *v.* LEWIS D. BARTON, Acting District Director, United States Immigration and Naturalization Service, District No. 11, DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause coming on for hearing and being submitted on plaintiff's verified complaint for declaratory judgment and injunctive relief, as amended, plaintiff's supporting affidavit, defendant's motion to dismiss and supporting affidavit, defendant's answer and supplemental affidavit, plaintiff's verified reply and plaintiff's cross-motion for summary judgment, and the Court having duly considered the evidence and being fully advised in the premises now finds the following:

FINDINGS OF FACT

I

Plaintiff is a foreign born resident of the United States. She arrived in the United States on an immigrant visa and was admitted for permanent residence on July 26, 1914, when she was eight years old. She received her sole formal education in the public and parochial schools of this country. She has been a resident of the United States for more than thirty-nine years and has lived continuously in the City of

St. Louis, Missouri for more than twenty-eight years. She was married in St. Louis on February 19, 1935, and she has lived in the same house in St. Louis since 1942, together with her husband and two minor children, all of whom are native-born citizens of the United States. Plaintiff also has a married daughter who is twenty-seven years old and four small grandchildren, all of whom are native-born citizens of the United States.

II

Defendant Lewis D. Barton is the Acting District Director, United States Immigration and Naturalization Service, District No. 11, and as such has administrative jurisdiction for said Service in the States of Missouri and Kansas.

III

In 1949, the Government started deportation proceedings against plaintiff. Those proceedings culminated in an order of deportation on April 3, 1953. During the pendency of these deportation proceedings, since 1949, plaintiff has been at liberty on bail, except for a short period of time in October, 1950, when the Attorney General sought to hold plaintiff without bail. This court then granted plaintiff a writ of habeas corpus, ruling that the action of the Attorney General in denying her bail was unlawful, unjust and an abuse of discretion. *Ex parte Sentner,* 94 F. Supp. 77.

IV

The bail bond in the sum of Two Thousand Dollars which plaintiff posted is still outstanding and in the possession of the United States Immigration and Naturalization Service.

Plaintiff has at all times kept herself available for any hearings which the service desired in the deporta-

tion proceedings, and she has fully complied with the terms of her bail bond.

V

So far as the record shows, Plaintiff has never been charged that her presence within the community constituted any danger to or in any way imperiled the national security, and plaintiff has at all times been engaged solely in lawful and peaceful pursuits within the community, her principal activities consisting of maintaining her household, taking care of her invalid mother, 69 years old, and raising her two minor children.

VI

A little more than six months after the entry of the final order of deportation, on October 9, 1953, Henry J. Colarelli, as Officer-in-Charge of the Immigration and Naturalization Service in the City of St. Louis, Missouri, issued an order of supervision and parole directed against plaintiff. This order purported to limit plaintiff's freedom in several respects, and pointed out that violation of the terms of such an order is a criminal offense in violation of Section 242 (d) of the so-called McCarran-Walter Act (The Immigration and Nationality Act of 1952, 8 U. S. C. Section 1252 (d)).

VII

Plaintiff thereupon brought this action against said Henry J. Colarelli, as Officer-in-Charge of the Immigration and Naturalization Service in the City of St. Louis, Missouri, to declare said order void and to enjoin its enforcement and the enforcement of Section 242 (d) of the McCarran-Walter Act.

VIII

The District Court issued a temporary restraining order upon plaintiff's verified motion after hearing evidence and finding that immediate and irreparable injury and damage was threatened to plaintiff, which order restrained said Colarelli as such official, and his agents and successors, from enforcing said order of supervision and parole of October 9, 1953. Plaintiff filed a cash bond of One Hundred Dollars as required by said temporary restraining order.

IX

Plaintiff's complaint charged that Section 242 (d) of the McCarran-Walter Act and the aforesaid order of supervision were unconstitutional, and a three-judge court was convened.

X

During the pendency of this action, and shortly before argument of this case, said Colarelli as such official modified the order of supervision and parole and served the new order upon plaintiff. Plaintiff amended her complaint to seek review of "any orders" issued pursuant to Section 242 (d). This court then set aside the previous temporary restraining order and issued a new temporary restraining order, restraining said Colarelli as such official and his agents and successors from enforcing or attempting to enforce the order of supervision and parole of October 9, 1953, or the order of supervision and parole of January 16, 1956. Plaintiff filed the same cash bond, as required by the temporary restraining order.

XI

The new order of supervision and parole of January 16, 1956, differs only slightly from the old one

and is now the basis of the controversy between the parties herein.

XII

During the pendency of this action and after argument of this case, said Henry J. Colarelli died, on or about September 6, 1956, and the defendant herein, Lewis D. Barton, as Acting District Director, United States Immigration and Naturalization Service, District No. 11, became charged with and assumed the duty of enforcing said order of supervision and parole of January 16, 1956, which duty had previously been charged to and assumed by said Colarelli.

XIII

On October 19th, 1956, the Government, by and through defendant's attorneys of record herein, the United States Attorney for the Eastern District of Missouri, and the Assistant United States Attorney for said District, moved the court, pursuant to Rule 25 of the Federal Rules of Civil Procedure, for an order substituting said Lewis D. Barton, Acting District Director, United States Immigration and Naturalization Service, District No. 11, as defendant herein in place of said Colarelli. The grounds set forth in said motion were that said Colarelli had died in the preceding month, that there is a substantial need for continuing this action against the proper officer of the Immigration and Naturalization Service, and that said Lewis D. Barton as such official is charged with the duty of enforcing said order of supervision and parole which is the subject of controversy between the parties herein. Plaintiff agreed to the granting of said motion.

XIV

On October 19th, 1956, this court thereupon entered an order substituting said Lewis D. Barton,

Acting District Director, United States Immigration and Naturalization Service, District No. 11, as defendant herein in the place of said Colarelli, after finding that said Lewis D. Barton as such official is now charged with the duty of enforcing the administrative order of supervision and parole which is the subject matter of this action, and that there is substantial need for continuing and maintaining the action against the said Lewis D. Barton in his said official capacity.

XV

The order of supervision and parole of January 16, 1956, which is the subject matter of this action, reads as follows:

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

District File No. A–4579002
A. R. No. A–4579002
Date January 16, 1956

ORDER OF SUPERVISION

In the case of Antonia Sentner, whose deportation in accordance with law was ordered on April 3, 1953.

Section 242 (d) of the Immigration and Nationality Act provides:

"Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and

psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than 1 year, or both."

Therefore, it is hereby ordered that such alien shall be placed under supervision and permitted to be and to remain at large upon the following terms:

(1) That said alien shall produce himself, at time and place designated, for deportation pursuant to the order of deportation.

(2) That said alien shall upon request produce himself at a time and place designated for the purpose of submitting to medical and psychiatric examination and/or to furnish such information as may be deemed fit and proper.

(3–a) That said alien shall notify the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) hereof of any change in residence or employment, within the immigration district, within 48 hours after change is made.

(3–b) That said alien shall apply to the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) for permission to change place of residence

from one immigration district to another, at least 48 hours prior to such change.

(4) That said alien shall report in Person on the 9th day of each month at ———— (a. m.) (p. m.) to the Officer in Charge of the Immigration and Naturalization Service at Room 602, New Federal Building, 12th and Market Streets, St. Louis, Mo.

(5) That said alien shall conduct herself in a lawful and orderly manner.

(6) That said alien shall terminate and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state, or of any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate, or subdivision of any such group or organization.

(7) That such alien shall refrain from "associating" with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in subparagraph (6) above, provided that the term "associating" as used in this subparagraph shall not be construed to include members of such alien's family or professional legal counsel if such associations are not used in furtherance of the doctrines, policies, or activities of any of the organizations or activities mentioned in subparagraph (6).

(8) That said alien shall not violate section 2385 of the "Smith" Act of June 25, 1948 (section 2385 of Title 18 U. S. Code) and Section 4 of the Internal Security Act of September 23, 1950 (section 783 of Title 50, U. S. Code).

(9) That said alien shall upon request report in person for the purpose of giving information under oath to an immigration officer con-

cerning her conduct, associations and activities.

(10) That said alien shall not travel outside the State of Missouri without obtaining prior permission from the officer-in-charge, Immigration and Naturalization Service, St. Louis, Mo.

HENRY COLARELLI,
St. Louis, Mo.
(*Officer in Charge, Immigration and Naturalization Service.*)

I, ANTONIA SENTNER, hereby acknowledge that I have read and understand the terms of this order, a copy of which I have received. I further understand that failure to comply with the terms of this order or with any of the conditions of 242 (d) of the Immigration and Nationality Act, will subject me to prosecution.

(Signature typed in, but alien did not sign)

ANTONIA SENTNER
(Alien's Signature)

5673 Cabanne Ave., St. Louis, Mo.

(SIGNED)
ERNEST W. ROSENKOETTER

Immigration Officer
Investigator
U. S. Immigration & Naturalization Service
St. Louis, Mo. (Address.)

I, ---------- hereby acknowledge that I understand the terms set forth above and hereby agree to furnish a written report ------ each month to the Officer in Charge concerning the alien's name, registration number, current address, place of employment, associates, and organizational activities, and that I will immediately report any failure on the part of the alien to comply with the terms of the order or information coming to my attention which might indicate that the alien intends to abscond or otherwise violate this order.

ST. LOUIS, MISSOURI; *January 16, 1956*:

I hereby certify that the above Form 1–220–B was read to the subject, Antonia Sentner in its entirety this date by Investigator Ernest W. Rosenkoetter, and that the subject thereupon refused to sign her name in the space provided therefor.

(SIGNED) WILLIAM H. PHILLIPS,
Investigator,
U. S. Immigration & Naturalization Service.
(SIGNED) NORMAN M. MAGEE,
Investigator
U. S. Immigration &
Naturalization Service.

XVI

Plaintiff's husband has been convicted of conspiracy to violate the Smith Act, 18 U. S. C. Sections 371 and 2385, from which judgment he has appealed to the Court of Appeals for the Eighth Circuit. At the trial of said case, he took the witness stand in his own defense and testified that he was a member of the Communist Party.

XVII

Defendant Barton, as such official, will, unless enjoined by the court, enforce said order of supervision and parole against plaintiff.

XVIII

Upon the facts presented by the verified pleadings, motions and affidavits on file and upon which this cause was submitted, there is no material fact in issue.

CONCLUSIONS OF LAW

I

The order of supervision and parole of January 16, 1956, which is the subject matter of this action, is in

general reviewable in this court in a proceeding of this sort.

II

This Court has jurisdiction of this action by virtue of 8 U. S. C. Section 1329 (Section 279, McCarran-Walter Act).

III

A three judge court was properly convened herein, pursuant to 28 U. S. C. Sections 2282 and 2284, as plaintiff's complaint seeks an injunction restraining the enforcement and operation of an Act of Congress for repugnance to the Constitution of the United States.

IV

Neither the Attorney General nor the Commissioner of Immigration is an indispensable party to this action.

V

Neither Section 242 (d) of the McCarran-Walter Act, nor the order of supervision and parole. authorizes the Attorney General or any of his subordinates, including defendant, to administratively revoke plaintiff's parole and detain or imprison her. If plaintiff should willfully and knowingly violate the terms of a valid order of supervision, all the Attorney General could do would be to institute criminal prosecution under Section 242 (d), in which case there would be a right to trial by jury.

VI

Parts of the order of supervision and parole create duties which are immediately enforceable by criminal prosecution and therefore are reviewable at this time.

VII

Paragraphs 1, 2 and 9 of the order present no justiciable controversy at this time.

VIII

Paragraphs 5 and 8 of the order are invalid because they exceed the authority conferred upon the Attorney General by Congress.

IX

Paragraphs 6 and 7 of the order are invalid because they exceed the authority delegated by Congress to the Attorney General.

X

Paragraphs 6 and 7 of the order are invalid for the further reason that the facts herein show that said paragraphs of the order establish an abuse of discretion on the part of defendant.

XI

Under Section 242 (d) of the McCarran-Walter Act, after the expiration of six months after the order of deportation has become final, the Attorney General retains only two powers with respect to the alien: To deport her, and to supervise her. The power to supervise is not an end in itself but is conferred only as an auxiliary to the power to deport, and is conferred only to the extent necessary to aid the Attorney General in carrying out his duty to deport the alien, that is, in assuring that the alien will be available for deportation.

XII

Paragraphs 3-a of the order, which provides: "That said alien shall notify the officer-in-charge of the Immigration and Naturalization Service at the

address shown in (4) hereof of any change in residence or employment, within the immigration district, within 48 hours after change is made", is authorized by Section 242 (d) as construed above and is valid and constitutional.

XIII

Paragraph 3–b of the order which provides: "That said alien shall apply to the Officer-in-Charge of the Immigration and Naturalization Service at the address shown in (4) for permission to change place of residence from one immigration district to another, at least 48 hours prior to such change", is construed by this court to mean that plaintiff must notify said officer in charge of her intention to change her place of residence to another district, and remain in the district for 48 hours after so doing and that plaintiff may then change her residence to another district without receiving affirmative permission. As so construed, this paragraph of the order is valid and constitutional.

XIV

Paragraph 4 of the order which provides: "That said alien shall report in Person on the 9th day of each month at ------ (a. m.) (p. m.) to the Officer in Charge of the Immigration and Naturalization Service at Room 602, New Federal Building, 12th and Market Streets, St. Louis, Mo.", is construed by this Court to mean that plaintiff must so report on or about the 9th day of each month unless she has, and communicates to him, some good reason not to appear. As so construed, this paragraph of the order is valid and constitutional.

XV

Paragraph 10 of the order which provides: "That said alien shall not travel outside the State of Mis-

souri without obtaining prior permission from the officer-in-charge, Immigration and Naturalization Service, St. Louis, Mo.", is construed by this Court to mean that plaintiff must give prior notice to the officer-in-charge for travel outside the state, but need not obtain his permission so to do. As so construed, this paragraph of the order is valid and constitutional.

XVI

Section 242 (d) of the McCarran-Walter Act, as construed in the Opinion, Findings and Conclusions filed in this case, is valid and constitutional.

XVII

Defendant's motion to dismiss plaintiff's complaint should be sustained insofar as the complaint seeks review of paragraphs 1, 2 and 9 of the order of supervision and parole. Defendant's motion to dismiss should be overruled in all other respects.

XVIII

Plaintiff's motion for summary judgment should be sustained as to paragraphs 5, 6, 7 and 8 of the order of supervision and parole, and these paragraphs should be stricken from the order. Plaintiff's motion should be overruled in all other respects.

XIX

Unless defendant, his agents and successors, are enjoined from enforcing paragraphs 5, 6, 7 and 8 of the order, plaintiff will suffer irreparable injury. Defendant, his agents and successors should be enjoined from enforcing these paragraphs.

XX

A declaratory judgment should be entered herein as follows:

(1) That part of Section 242 (d) of the McCarran-Walter Act which authorizes the Attorney General to make an order of supervision is valid and constitutional as hereinabove construed.

(2) Paragraphs 3–a, 3–b, 4 and 10 of the order of supervision, as interpreted above, are valid and enforceable.

(3) The order of supervision, as it remains after striking paragraphs 5, 6, 7 and 8, is not invalid on its face, and so much of it as is valid may be enforced.

DATED this 2nd day of November, 1956.

(SIGNED) JOSEPH W. WOODROUGH,
Circuit Judge,
United States Court of Appeals.

(SIGNED) GEO. H. MOORE,
United States District Judge.

(SIGNED) ROY W. HARPER,
United States District Judge.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

Civil No. 9440 (1)

ANTONIA SENTNER, PLAINTIFF, *v.* LEWIS D. BARTON, ACTING DISTRICT DIRECTOR, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, DISTRICT No. 11, DEFENDANT

ORDER

The above-entitled cause coming on for hearing before the Court on January 19, 1956, and being duly submitted for consideration and decision, and the Court, after due deliberation, having rendered its decision and having filed its Memorandum Opinion, Findings of Fact and Conclusions of Law herein, now, pursuant thereto,

It is hereby

ORDERED AND ADJUDGED that defendant's motion to dismiss plaintiff's complaint is sustained insofar as the complaint seeks review of paragraphs 1, 2 and 9 of the order of supervision and parole issued by Henry J. Colarelli, Officer in Charge, United States Immigration and Naturalization Service, on October 9, 1953, and reissued, as modified on, January 16, 1956, that defendant's motion to dismiss is overruled in all other respects, and that plaintiff's complaint, insofar as it seeks review of these paragraphs of the order at this time, is dismissed without prejudice.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff's motion for summary judgment is sustained as to paragraphs 5, 6, 7 and 8 of the order, that plaintiff's motion is overruled in all other respects, that said paragraphs 5, 6, 7 and 8 of the order are invalid and unenforceable and should be, and hereby are stricken from the order.

IT IS FURTHER ORDERED AND ADJUDGED that Lewis D. Barton, Acting District Director, United States Immigration and Naturalization Service, District No. 11, the defendant herein, his agents, successors, deputies and employees and all other persons acting, by, through or under them or either of them or by or through their order, be, and they are hereby permanently enjoined and restrained from enforcing or attempting to enforce directly or indirectly paragraphs 5, 6, 7 and 8 of the aforesaid order of supervision and parole.

IT IS FURTHER ORDERED AND ADJUDGED that the Temporary Restraining Order entered in this cause by the Court on January 23rd, 1956, be and the same is hereby set aside, and that plaintiff's cash bond in the sum of One Hundred Dollars ($100.00) heretofore filed and approved herein, be released.

IT IS FURTHER ORDERED AND ADJUDGED that that part of Section 242 (d) of the McCarran-Walter Act (The Immigration and Nationality Act of 1952, 8 U. S. C. Section 1252 (d)) which authorizes the Attorney General to make an order of supervision is valid and constitutional as construed in the Court's Memorandum Opinion and Conclusions of Law filed herein, that paragraphs 3-a, 3-b, 4 and 10 of the order are valid and enforceable as construed in the Court's Memorandum Opinion and Conclusions of Law filed herein, and that the aforesaid order of supervision and parole,

as it remains after striking paragraphs 5, 6, 7 and 8 is not invalid on its face, and so much of it as is valid may be enforced.

DATED this 2nd day of November, 1956.

(SIGNED) JOSEPH W. WOODROUGH,
Circuit Judge,
United States Court of Appeals.

(SIGNED) GEO. H. MOORE,
United States District Judge.

(SIGNED) ROY W. HARPER,
United States District Judge.

U. S. GOVERNMENT PRINTING OFFICE: 1957

FEB 18 1957
JOHN T. FEY, Clerk

No. [redacted]784

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

LEWIS D. BARTON, District Director, United States Immigration and Naturalization Service, District No. 11,
Appellant,

v.

ANTONIA SENTNER.

Cross-Appeal from the United States District Court for the Eastern District of Missouri.

JURISDICTIONAL STATEMENT.

SYDNEY L. BERGER,
7 Koenig Building,
Evansville 8, Indiana,

R. L. WITHERSPOON,
1518 North Sarah Street,
St. Louis 13, Missouri,

Attorneys for Appellee and Cross-Appellant.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.

No. 728.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

LEWIS D. BARTON, District Director, United States Immigration and Naturalization Service, District No. 11,
Appellant,

v.

ANTONIA SENTNER.

Cross-Appeal from the United States District Court for the Eastern District of Missouri.

JURISDICTIONAL STATEMENT.

OPINION BELOW.

The opinion of the statutory three judge court is reported at 145 F. Supp. 569. It is set out in Appendix A to appellant Barton's Jurisdictional Statement at pp. 12-38 (Lewis D. Barton, the appellant herein, was substituted for Henry J. Colarelli, the original defendant, by order entered October 19, 1956). The findings of fact and conclusions of law are annexed thereto as Appendix B, at pp. 39-53.

JURISDICTION.

The order of the three judge court granting and denying an injunction was filed November 2, 1956. It is annexed to appellant Barton's Jurisdictional Statement as Appendix C at pp. 53-56. Appellant's notice of appeal to this Court was filed November 30, 1956, and appellee then filed her notice of cross-appeal herein on December 19, 1956. The jurisdiction of this Court on appeal from the order of the three judge court granting and denying an injunction is conferred by 28 U. S. C. 1253.

QUESTIONS PRESENTED.

1. Whether the Constitution of the United States allows the Attorney General or a subordinate official to threaten an alien housewife with criminal prosecution because she refuses to leave her citizen husband, who is a Communist, and thus break up their family, where there is an administrative order of deportation against her based solely on her former membership in the Communist party more than 18 years ago, where she has lived in the United States for over 40 years since childhood, has received her formal education in the public and parochial schools of this country, and has at all times engaged solely in lawful and peaceful pursuits within the community, her principal activities consisting of maintaining her household, taking care of her invalid mother and raising her two minor children.

2. Whether Sec. 242 (d) of the McCarran-Walter Act (the Immigration and Nationality Act of 1952) is unconstitutional on its face and as here applied for the following reasons:

(1) It is a penal statute which does not allow the court which tries a defendant for a crime to pass on all the elements of the crime, and thus deprives a de-

fendant of the right to trial by jury and of due process of law in violation of the Sixth and Fifth Amendments to the Constitution of the United States.

(2) It authorizes the Attorney General and subordinate administrative officials to place aliens against whom an order of deportation has been issued under strict supervision and parole and prescribe regulations for their conduct without establishing any legislative standards therefor, thus constituting an unlawful delegation of legislative power to the Attorney General and administrative officials in violation of Article I, Section 1 of the United States Constitution.

(3) It is a penal statute which is so vague and indefinite as to give inadequate notice of the crime created by it in violation of the Fifth Amendment to the United States Constitution.

(4) It allows the Attorney General and subordinate officials to dictate to an alien what she may do, where she may go, even whom she may see and what she may say, and thus deprives her of her rights of free speech and association and of her liberty without due process of law, in violation of the First and Fifth Amendments to the United States Constitution.

(5) It deprives aliens of their right to freely obtain counsel, in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

(6) It places a restriction upon citizens in the exercise of their right to speak with and associate with aliens, in violation of the First Amendment to the Constitution, and is an attempt by Congress to regulate all the dealings of some citizens and aliens, which is a field beyond the ambit of congressional power, in violation of the Ninth and Tenth Amendments to the United States Constitution.

(7) It attaches criminal penalties to conduct which was legal when engaged in, and thus constitutes ex post facto legislation, in violation of Article I, Section 9, and of the Fifth Amendment to the United States Constitution.

(8) It is a bill of attainder in violation of Article I, Section 9, of the United States Constitution.

(9) It authorizes an unlimited roving inquisition by interrogation, by physical examination and even by psychiatric examination into an alien's conduct, her very thoughts and her most intimate secrets, and thus constitutes an invasion of the right of privacy and an illegal search and seizure in violation of the Fourth Amendment to the United States Constitution.

(10) It inflicts cruel and inhuman punishment in violation of the Eighth Amendment to the United States Constitution.

3. Whether an alien, against whom a final administrative order of deportation has been outstanding for more than six months, and whose deportation cannot be effected, can be subjected to strict supervision by subordinate administrative officials and thus deprived of liberty and property without due process of law in violation of the Fifth Amendment.

4. Whether paragraphs 1, 2 and 9 of the order of supervision present a justiciable controversy at this time.

5. Whether paragraphs 1, 2, 3-a, 3-b, 4, 9 and 10 of the order of supervision are arbitrary, unreasonable and an abuse of power, and, therefore, in violation of Section 242 (d) of the McCarran-Walter Act and of the First, Fourth, Fifth, Sixth, Ninth and Tenth Amendments to the United States Constitution.

STATUTE INVOLVED.

Section 242 (d) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 208, 211, as amended September 3, 1954, 68 Stat. 1232, 8 U. S. C. (1952 ed. Supp. III) 1252 (d), provides:

> Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien, who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both.

THE ISSUES ARE SUBSTANTIAL.

This case, and the issues raised herein on appellee's cross-appeal, present questions far more substantial and far-reaching than those set forth in appellant Barton's Jurisdictional Statement.

The question left open in **United States v. Spector**, 343 U. S. 169 (1952), because it was not raised therein, whether a statute similar to Section 242 (d) is unconstitutional because it deprives a defendant of a jury trial in violation of due process of law, is squarely raised by appellee's cross-appeal herein.

Further, the statute here involved authorizes, and the administrative order herein questioned attempts to effectuate, a regimentation over the life of a lawful resident alien of our country that is unprecedented. Appellant has attempted to place appellee under detailed parole, and to have subordinate administrative officials regulate her everyday existence, restrict her freedom to walk, to talk, even to think, to place the stigma of "parolee" on her, which affects not only appellee, but her two native born citizen children. The only basis for this sweeping assertion of power is that appellee was charged with having been a member of the Communist Party more than 18 years ago. The record herein is uncontroverted that appellee has never committed any crime, that she has engaged at all times solely in lawful and peaceful pursuits.

The impact on appellee and on her citizen children is serious enough, the importance of family life to our democracy vital enough, to create substantial questions justifying the attention of this Court on appeal.

But much more is involved. There are thousands of aliens, law-abiding residents of this Country, whose lives are similarly regimented by virtue of Section 242 (d). The

impact on their lives presents serious and substantial questions.

Finally, if the liberties of a peaceful, law-abiding, long-time resident of this country, a loving wife and devoted mother of children who are native born citizens, can be subject to the arbitrary whim of a petty bureaucrat, and can be restricted and even destroyed by administrative fiat, then the freedom and self-respect of American citizens are already endangered.

CONCLUSION.

For all these reasons, and others it is not necessary to burden the Court with at this time, appellee's cross-appeal presents substantial questions which should be reviewed by this Court.

Respectfully submitted,

SYDNEY L. BERGER,
R. L. WITHERSPOON,
Attorneys for Appellee and
Cross-Appellant.

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 784

ANTONIA SENTNER, APPELLANT

v.

LEWIS D. BARTON, DISTRICT DIRECTOR, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, DISTRICT No. 11

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

MOTION TO DISMISS CROSS-APPEAL

The Solicitor General, on behalf of Lewis D. Barton, the above-named appellee, moves to dismiss the cross-appeal filed by Antonia D. Sentner as untimely under 28 U. S. C. 2101.

The order of the three-judge district court, granting in part and denying in part an injunction in this case, was entered November 2, 1956. Notice of appeal by Lewis D. Barton from that order and from conclusions of law Nos. IX, X, XI, XIII, XV, XVIII, XIX embodied in the order (See Jurisdictional Statement filed in No. 728) was filed November 30, 1956. Appellant's notice of cross-appeal from the

order and from conclusions of law VII, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XX was not filed until December 19, 1956. Since that notice was filed more than 30 days after the order of the district court, it was out of time under 28 U. S. C. 2101. See also Rule 11 (3) of the Rules of this Court.

Some of the questions which appellant has tried to raise by her cross-petition will remain available to her in answer to the issues raised by the government's appeal in this case. The following are, however, separate from the issues raised on the government's appeal and therefore not validly brought before the Court by this attempted cross-appeal:

1. The holding that paragraphs 1, 2 and 9 of the order of supervision do not present a justiciable controversy at this stage (Question 4 and part of Question 5 of the notice of cross-appeal, Conclusions of Law VII and XVII).

2. The holding that paragraphs 3 (a) and 4 of the order of supervision are valid (Part of Question 5 of the notice of cross-appeal, Conclusions of Law XII, XIV and part of XX (2)).

3. Question 1 of the notice of cross-appeal, which seeks to raise, without reference to any conclusion of law, the issue as to whether petitioner can be threatened with criminal prosecution because she refuses to leave her citizen husband, who is a Communist.

It should be noted that this last question (Question 1 of the notice of cross-appeal) is not properly before this Court without regard to the issue of timeliness. Paragraph 11 of the original complaint (R. 4) which

made allegations that such action had been threatened and which was denied by the government in its answer (R. 27) was withdrawn by the plaintiff so that there would be no issue of fact to preclude summary judgment (R. 38). Plaintiff did argue that the effect of the order of supervision was to bring about the same result even though by the amended order it was specifically provided that she was not barred from associating with her husband because paragraph 7 of the order of supervision provided that family associations were not barred "if such associations are not used in furtherance of the doctrines, policies, or activities" of the proscribed organization. But the validity of that provision is far different from the question which plaintiff seeks to present.

CONCLUSION

It is respectfully submitted that the cross-appeal should be dismissed.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

MARCH 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957

No. 784.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

ANTONIA SENTNER, Appellant,

v.

LEWIS D. BARTON, District Director, United States Immigration and Naturalization Service District No. 11.

Cross-Appeal from the United States District Court for the Eastern District of Missouri.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS CROSS-APPEAL.

The appellant on this cross-appeal respectfully submits that the Solicitor General is in error when he states that her cross-appeal is untimely under 28 U. S. C. 2101.

We concede that appellant's notice of cross-appeal was filed more than 30 days after the order of the district court. However, it was filed less than 60 days after said order.

The order of the district court did not hold unconstitutional in whole or in part any act of Congress. Said order

was not an interlocutory order, but was a final order and judgment.

Therefore, appellant's notice of cross-appeal, which was filed within 60 days of said order, was timely filed under 28 U. S. C. 2101 which provides:

> "(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253, and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within 30 days after the entry of the interlocutory or final order, judgment or decree. * * *
>
> "(b) Any other direct appeal to the Supreme Court, which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within 30 days from the judgment, order or decree appealed from, if interlocutory, **and within 60 days if final.**
>
> "* * *" (Emphasis supplied.)

Appellant would also respectfully point out that, contrary to the position taken by the Solicitor General, Question 1 set out in her notice of cross-appeal is properly before this Court on the original appeal, as well as on this cross-appeal.

While the appellee is correct that paragraph 11 of the Original complaint was withdrawn by the plaintiff, the first temporary restraining order, which was issued December 17, 1953, states that the district court found "that the plaintiff is threatened with immediate criminal prosecution by virtue of the defendant's attempts to enforce his order of supervision and parole of October 9, 1953 which he has heretofore issued against the plaintiff; . . ." The original order of supervision was modified by the defendant, but this modification did not affect this finding

of fact, and the district court therefore issued a new restraining order on January 23, 1956 after such modification. Plaintiff's withdrawal of paragraph 11 of her complaint withdrew only the allegations that the then defendant made certain oral statements; she reasserted the risk of prosecution in paragraph 5 of her reply; and there was no withdrawal of the fact found by the district court that criminal prosecution was threatened.

Appellant would further point out that this is a cross-appeal and that its purpose is to insure that all aspects of the questions raised by this case will be brought before this Court for its decision. Dismissal of appellant's cross-appeal would unduly restrict the scope of the issues on appeal and this Court's examination of the alleged unconstitutionality of Section 242 (d) of the McCarran-Walter Act.

CONCLUSION.

The cross-appeal should not be dismissed.

Respectfully submitted,

SYDNEY L. BERGER,
R. L. WITHERSPOON,
Attorneys for Cross-Appellant.

March, 1957.

No. 728. BARTON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, *v.* SENTNER; and

No. 784. SENTNER *v.* BARTON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. Appeals from the United States District Court for the Eastern District of Missouri. *Per Curiam:* The judgment is affirmed. See *United States* v. *Witkovich*, 353 U. S. 194.

MR. JUSTICE BURTON and MR. JUSTICE CLARK dissent. They would note jurisdiction of this appeal and afford the Attorney General an opportunity to present the Government's side of this important internal security problem. *United States* v. *Witkovich, supra,* in which they dissented, limited § 242 (d)(3) of the Immigration and Nationality Act of 1952, 66 Stat. 211, as amended, 8 U. S. C. (Supp. IV) § 1252 (d)(3), "to authorizing all questions reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens . . . ." It passed on clause (3) and no other. This appeal involves other clauses of § 242 (d), namely, clauses (1) and (4), neither of which was passed on in *Witkovich*. The Court, by summary affirmance of this appeal, without argument, enlarges its holding in *Witkovich* and strikes down two more clauses of § 242 (d). These two clauses are vital to the effectuation of the purpose of the Congress in controlling subversives whose ordered deportation has been forestalled by technical difficulties. For a more detailed discussion see their dissent in *Witkovich*.

Solicitor General Rankin, Assistant Attorney General Olney and *Beatrice Rosenberg* for Barton. *Sydney L. Berger* for Sentner. Reported below: 145 F. Supp. 569.